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No. 07-987

IN THE

Supreme Court of the United States

MARTIN WISNIEWSKI and ANNETTE WISNIEWSKI,
on behalf of their son Aaron Wisniewski,

Petitioners,

v.

BOARD OF EDUCATION OF THE WEEDSPORT
CENTRAL SCHOOL DISTRICT and
RICHARD MABBETT, Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners allude to a "growing conflict" in the circuits and "ongoing uncertainty as to the First Amendment protection afforded to off campus student speech" (Pet. Br. at 15) but have failed to present compelling reasons for their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to be granted. *See* Sup. Ct. R. 10. In *Wisniewski v. Board of Education of the Weedsport Central School District and Richard Mabbett, Superintendent of Schools*, 494 F.3d 34 (2d Cir. 2007), the Second Circuit held that the school district did not violate Aaron Wisniewski's First Amendment rights when it suspended him for circulating an instant messenger icon that threatened a teacher and caused substantial disruption to the school. Petitioners failed to demonstrate that the opinions of other circuits conflict with the Second Circuit's application of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), to off campus speech or that the Second Circuit ruled on an important matter of federal law that has not been decided by this Court or that was decided differently by this Court. *See* Sup. Ct. R. 10(a)-(c). The Second Circuit properly analyzed off campus speech under *Tinker* and found no First Amendment violation, where it was reasonably foreseeable both that the speech would come to the attention of school officials and that it would cause substantial disruption in school. Petitioners also failed to demonstrate any compelling reasons why this Court should consider their belated challenge to the school district's threat policy as a prior restraint on student speech. Far from the boundary of uncertainty as to First Amendment protection for student speech,

Aaron's dissemination of an icon that threatened his teacher to fifteen classmates placed this case well within the *Tinker* analysis that the Second Circuit applied. Petitioners have failed to set forth compelling reasons for review and the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioners commenced this action on November 6, 2002, in the United States District Court for the Northern District of New York. They alleged that Respondents violated Aaron Wisniewski's First Amendment free speech rights, 42 U.S.C. § 1983 and the New York Education Law when they suspended him from school for one semester for circulating an "instant messenger" icon that threatened his teacher to approximately fifteen of his friends.

A. The "Kill Mr. VanderMolen" Icon

In April 2001, Aaron Wisniewski was an eighth grade student in the Weedsport Central School District ("District"). It is undisputed that Aaron created an "icon" that he attached to the instant messaging feature of his home computer. (JA 13). The icon included a crude drawing of a head with a gun pointed at it, and red blood splattering from the head along with the words "Kill Mr. VanderMolen." (JA 14). Aaron used the paint program on his computer to draw a head, a gun, and bullets, which were depicted as being shot out of the gun toward the person's face, with red blood spurting from the person's head. At the time Aaron created and transmitted the icon, Philip VanderMolen was his eighth grade English teacher. (JA 191). Aaron set up his instant messaging

"buddy list" so that the icon would be automatically circulated to anyone he communicated with via instant message. (JA 14). Aaron circulated the icon among fifteen of his friends for approximately three weeks during April 2001. (JA 14; 92). The friends were Aaron's classmates at school. The "Kill Mr. VanderMolen" icon would pop up on the screens of Aaron's "buddies" when he sent them an "instant message."

On March 29, 2001, Middle School Principal Linda Rice, together with the school psychologist, school social worker and guidance counselor, had visited each middle school classroom to discuss school violence. During the presentation, Principal Rice advised that all threats of violence would be taken seriously and would not be treated as jokes. (JA 74-77; 99-100). Aaron acknowledged that he was present for the session, and that he recalled Principal Rice saying that even jokes would be taken seriously. (JA 90; 244). Aaron created and circulated the icon not long after that session. (JA 91; 244).

B. The District's Investigation

The threatening icon first came to the attention of school officials on April 26, 2001. On April 25, 2001, another student of the District, Chad McDeid, sent Mr. VanderMolen an e-mail advising him of the threatening icon. The e-mail from Chad did not include the icon, but did identify the "screen name" that Aaron was using. When Mr. VanderMolen read the e-mail on the morning of April 26, 2001, he became concerned that a student wanted to kill him. (JA 80). He went to the office to bring the threat to the attention of Middle School Principal Linda Rice, but she was not present at the building.

Accordingly, he brought it to the High School Principal Barry Copeland, who was in the adjacent school building.

Principal Copeland observed Mr. VanderMolen to be distraught. Principal Copeland advised Mr. VanderMolen that he would be contacting the Sheriff's Department and sharing the information with the Superintendent and Middle School Principal for appropriate action.

After delivering the e-mail to the High School principal, Mr. VanderMolen was out of the school building for the balance of the school day on a field trip with students. (JA 82; 97).

On the morning of April 26, 2001, the Superintendent of Schools and Middle School Principal were at a United Way function in Auburn, New York. (JA 42; 295). High School Principal Copeland later arrived at the function, and reported the threat to Superintendent Mabbett. (JA 42-43; 295-96). Also present at the function was Lieutenant John Lamphere of the Cayuga County Sheriff's Department, and Superintendent Mabbett brought to his attention the information regarding the threat against Mr. VanderMolen. (JA 44-45; 297).

Superintendent Mabbett then returned to the school building, where he met with Middle School Principal Rice to discuss what investigation they would undertake to determine the nature of the threat. (JA 46-47). Superintendent Mabbett and Middle School Principal Rice interviewed Aaron Wisniewski. (JA 48-54; 304-07). Middle School Principal Rice began the interview by questioning Aaron as to whether he had any dangerous items in his possession. She then asked whether he had

any issues or concerns with any people in the building. She asked Aaron if he had sent a threatening message over e-mail, and Aaron said "he did not know anything about it." (JA 352). Aaron acknowledged that he was asked whether he had sent any e-mails threatening persons in the school, and he responded: "I was like, what are you talking about?" (JA 94). Principal Rice also asked Aaron about the "screen name," that was identified in Chad's e-mail to Mr. VanderMolen, and Aaron said it was an old screen name he was no longer using. Aaron was then sent back to his class. (JA 55). In addition to questioning Aaron, Principal Rice searched his backpack and his locker. (JA 63).

Superintendent Mabbett and Principal Rice then interviewed Chad McDeid. (JA 56). McDeid advised that the icon had been circulated to individuals on Aaron's instant messaging "buddy list." He identified Tim Church as another student on Aaron's "buddy list" who had seen the icon. (JA 65). They then interviewed Timothy Church, which by no means concluded the District's investigation, as Petitioners contend. (Pet. Br. at 8; JA 57; 66-68). Petitioners' description of what the student told administrators is also inaccurate. (Pet. Br. at 8). Tim Church provided a handwritten statement during the interview:

> I held a conversation with Aaron about his icon and I asked why he had that and he simply said "because I hate him and I don't like him." Then that brought me up to asking him why he doesn't like Mr. V and he said "because I don't like him, and I wish he were dead."

(JA 104).

After the school day was over, Chad McDeid returned home, obtained a printout of the icon, returned to school and gave it to Principal Rice. (JA 61). Mr. VanderMolen was also present when Chad returned with the icon and that is when he first saw the icon. (JA 81-82).

The next morning, April 27, 2001, Superintendent Mabbett, Principal Rice, Mr. and Mrs. Wisniewski and Aaron met with Lieutenant Lamphere at the District Office. (JA 58). During this meeting, Aaron admitted he created the icon. (JA 59; 317). Petitioners assert that the District violated Aaron's rights by refusing to allow him to question witnesses. (Pet. Br. at 10). That is not accurate. Principal Rice asked the Wisniewskis if they wanted to speak with Mr. VanderMolen, and Mrs. Wisniewski declined, stating that Mr. VanderMolen had been through enough. (JA 70; 99; 359).

Following this meeting, Principal Rice suspended Aaron from school for five days. (JA 69-73). She advised the parents of this suspension by letter dated April 27, 2001, which further advised that a Superintendent's Hearing had been recommended. (JA 106).[1]

C. The Superintendent's Hearing

On April 30, 2001, the District issued a Notice of a Superintendent's Hearing, scheduled for May 3, 2001. (JA 113). Prior to the hearing, plaintiff's attorney met with witnesses, including Mr. VanderMolen. (JA 109). The Superintendent's Hearing ultimately took place on

1. Petitioners allude to a procedural error but never raised it below.

May 29, 2001 before hearing officer Lynda VanCoske. At the outset of the hearing, it was stipulated that Superintendent Mabbett would recuse himself from making a decision on the hearing officer's findings and recommendation, and that the hearing officer's decision and recommendation on charges would be consolidated in a single process before the District's Board of Education to decide the charges and determine the penalty. (JA 175). At the hearing, Aaron was represented by his current attorneys. The District was represented by Attorney David Hoover. Aaron's parents were both present for the Hearing. The District called High School Principal Copeland, Mr. VanderMolen, Middle School Principal Rice and Chad McDeid as witnesses. (JA 110). During the hearing, Mr. VanderMolen testified that he became sick to his stomach when he learned of the threat and that he felt scared when he saw the icon. (JA 193). He further testified that he did not feel safe in the classroom with Aaron and that he therefore requested an alternative assignment. (JA 196).

Principal Rice testified about the interference the threat caused to school operations, and in particular that all of the students in Aaron's English class had to have a substitute teacher for the rest of the year. (JA 207). Principal Rice also testified about how she had visited every middle school classroom to discuss threats and school violence on March 29, 2001. (JA 209).

Aaron testified at the hearing. During his testimony, Aaron acknowledged that he was questioned on April 26, 2001 about having "sent threatening messages to other students regarding a faculty member," and that he responded "I said I don't have any idea what you're

talking about." (JA 237). Aaron further testified that later in the day a fellow student mentioned the icon to him and that is when he first realized that Superintendent Mabbett and Principal Rice were referring to the icon when they asked him about threatening messages about teachers. He acknowledged that he still did not come forward with the truth. (JA 243).

Aaron testified about his feelings towards Mr. VanderMolen, stating that Mr. VanderMolen is "not really popular" with the students because he gives a lot of homework. Aaron indicated that he thought Mr. VanderMolen was a tough grader and that he disagreed with Mr. VanderMolen's teaching methods. (JA 239).

Aaron testified that he created the icon "to be funny" and to "have people laugh at me and have it be a joke." (JA 236). In his hearing testimony, when asked how he felt about what he had done, he testified "I think it was a real stupid decision. I just hope I can learn from it and go on." (JA 245). On cross-examination, Aaron acknowledged that he had been present for Principal Rice's presentation on school violence, and that she had stated that threats would not be considered as jokes. (JA 91; 243). Aaron also admitted that he had not yet created the icon at the time of this presentation, but designed and circulated it *after* attending the school violence presentation. (JA 244).

In addition to the testimony and exhibits at the hearing, plaintiffs obtained a "threat assessment" from a psychologist, Norman J. Lesswing. The "threat assessment" is dated June 1, 2001, and was submitted

to the hearing officer after the hearing. (JA 110; 144-45). Dr. Lesswing's threat assessment was among the documents examined by both the hearing officer and the Board of Education.

The report of Dr. Lesswing indicated that based upon his visit to the home and an interview of Aaron, he had concluded that Aaron:

> does not pose any threat of harm or danger to Mr. VanderMolen, or anyone else for that matter. He possesses no violent intent, and has not displayed any interest in, access to, nor has he ever used firearms. However inappropriately expressed, Aaron's motivation in this matter was jocular, and in the context of private communication among friends outside of school.

(JA 144-45).

By letter dated June 3, 2001, the District submitted its closing statement. The District's closing statement asserted that the threatening icon was not subject to First Amendment protection. The District argued that notwithstanding Aaron's testimony that he intended to make people laugh at him, there was nothing about the icon which identified it as a joke or anything other than a serious statement. The District further noted the substantial disruption to the school as a result of the threatening icon. In light of the threat to his life, Mr. VanderMolen requested that he be reassigned to a different class and not teach Aaron's class. Mr. VanderMolen did not teach Aaron's section of eighth grade English for the balance of the year. (JA 154).

D. The Hearing Officer's Decision

On June 12, 2001, the hearing officer issued a decision. The hearing officer specifically analyzed whether the icon was a threat or a joke, and rejected the assertion that it was a joke:

> Aaron is unquestionably bright and articulate. His testimony that the icons and message were a joke was unconvincing, and he provided no explanation, justification or context for these icons being construed as jokes. Common sense dictates that without context or explanation, threatening words such as "Kill Mr. VanderMolen" are not a joke. Mr. VanderMolen did not take these words as a joke. Mr. VanderMolen testified that he was scared, concerned, and felt sick to his stomach upon reading the message. Until the issue was resolved, he asked to be removed from teaching Aaron's class because he felt uncomfortable teaching the class and was concerned about his and his six-month old child's safety. The district honored that request. Ms. Rice testified that Mr. VanderMolen appeared anxious and fearful.
>
> In addition, on approximately March 29, 2001, Ms. Rice, with the social worker and director of guidance, visited every class and spoke to students about the topic of threats. They advised students that any threats must be communicated to adults and that these threats will not be considered jokes. Aaron admits being present at that meeting. He heard Ms.

> Rice explain that threats were no joke, yet he still created the threat and icons after Ms. Rice's visit.

(JA 458). Contrary to Petitioners' assertions, the hearing officer considered the findings of the Sheriff's Department and Dr. Lesswing that Aaron did not intend to kill Mr. VanderMolen, but found that such intent to kill was not determinative of whether Aaron made a threat. (JA 460). The hearing officer concluded:

> As a result of the foregoing, I conclude Aaron did commit the act of threatening a teacher, in violation of page 11 of the student handbook, creating an environment threatening the health, safety and welfare of others, and his actions created a disruption in the school environment.
>
> I recommend a suspension of the first semester of the 2001-2002 academic year. Given the timing of the hearing, the delay in issuing the decision, due to waiting for Dr. Lesswing's conclusion, and delay in receiving Wisniewski's closing statement (on several occasions, I contacted Mr. O'Hara's office requesting the closing statement) and the decision so close to the last day of school, a suspension in the 2000-2001 year is not practical.

(JA 460-61).

E. The Appeal to the Board of Education

Following the decision of the hearing officer, the matter was set for hearing by the Board of Education to consider the findings and recommendations. By letter dated July 23, 2001, Petitioners' attorney requested that certain items be provided to the Board of Education for their review. (JA 118). On July 24, 2001, the Wisniewskis appeared with their attorney before the District's Board of Education. During the course of their argument, Petitioners objected to the adequacy of the transcript that had been prepared. The Board agreed to delay its consideration of the matter pending receipt of a corrected transcript. (JA 111).

By letter dated September 6, 2001, the attorney for the District sent the attorney for the Wisniewskis a revised transcript. By letter dated September 10, 2001, the Wisniewskis' attorney advised that he could stipulate to the changes, except for one. The attorney for the District agreed with the one change requested by the plaintiffs. The corrected transcript was then provided to the Board of Education. (JA 112).

On September 24, 2001, the Board of Education adopted a resolution accepting the findings of fact of the hearing officer and suspending Aaron for one semester.[2] The Board of Education stated that it had reviewed the charge, the exhibits, the report of Dr. Lesswing, the corrected transcript of the hearing, the closing

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2. Petitioners did not allege below and cannot argue now that the Board approved the hearing officer's recommendation of a 30-day suspension as a "penalty" or retaliation for the Wisniewskis' rejection of the 30-day suspension compromise.

statements and letter memoranda presented by the attorneys for the District and the parents, and the decision of the hearing officer. (JA 259-60). The District immediately began steps to implement a program of alternative instruction which was provided during the period of the suspension.

On January 28, 2002, Aaron returned to school in the District at the completion of the suspension. He completed ninth and tenth grade in the District, but changed schools when his mother moved. (JA 95).

Mr. VanderMolen continued to teach in the District, but sought counseling as a result of the fear engendered by the death threat. (JA 84-85; 293). Mr. VanderMolen testified that he has never viewed the threat as a "joke," and that he has ongoing concerns about the threat in light of the fact that Aaron himself has never addressed the issue with Mr. VanderMolen, much less apologized to Mr. VanderMolen for his conduct. (JA 83; 86-89).

Following the Board's adoption of the hearing officer's recommendation of a one semester suspension, Petitioners chose not to appeal to the Commissioner of Education. Instead, they commenced this federal action the following year, alleging violations of Aaron's First Amendment rights, 42 U.S.C. § 1983 and state education law.

F. District Court's Decision on Respondents' Summary Judgment Motion

Following discovery, Respondents moved for summary judgment on grounds that Aaron's "Kill Mr. VanderMolen" icon was a threat which is not entitled to First Amendment protection. They also argued that the hearing officer's conclusion that Aaron threatened Mr. VanderMolen was entitled to preclusive effect because the threat issue was litigated in a quasi-judicial state administrative proceeding and is central to Petitioners' First Amendment claims. Respondents further argued that Superintendent Mabbett was entitled to qualified immunity and there was no factual or legal basis for the Petitioners' state education law claims.

The District Court granted Respondents' motion and dismissed the first three claims under the First Amendment and 42 U.S.C. § 1983. Chief Judge Mordue concluded that collateral estoppel barred the Wisniewskis from re-litigating the threat issue, which was fully litigated before the hearing officer in a properly conducted quasi-judicial state administrative proceeding. In addition, the District Court concluded with respect to Petitioners' First Amendment and Section 1983 claims that:

> . . . [V]irtually all material facts are undisputed. On their face, the words "Kill Mr. VanderMolen" and the accompanying graphic can not be viewed as anything but an unequivocal, unconditional, immediate threat of injury specific as to the person threatened, such as conveys a gravity of purpose and

imminent prospect of execution. *See Malik*, 16 F.3d at 51. Likewise, the surrounding circumstances – including the effect of the icon on Mr. VanderMolen and School officials, Aaron's awareness of the School's position that a threat was not a joke, the absence of any factor to suggest that the icon was a joke, and the general increase in school violence – establish that an ordinary, reasonable recipient who is familiar with the context of the icon would interpret it as a serious threat of injury. *See id.*; *see generally Doe*, 306 F.3d at 625; *Lovell*, 90 F.3d at 372. Plaintiffs do not point to any material questions of fact regarding these circumstances.

There is no merit to plaintiffs' assertion that questions of fact exist due to the conclusions of the Sheriff's Department and Dr. Lesswing that Aaron did not pose an actual threat and did not intend to carry out the threat. It is well established that lack of intention or ability to carry out a threat is not relevant. *See, e.g., Porter*, 393 F.3d at 616; *Doe*, 306 F.3d at 625, n.3; *Kelner*, 534 F.2d at 1027. **Further, to the extent that plaintiffs attempt to argue that Aaron's conduct was purely out-of-school conduct, the undisputed evidence establishes that the icon was a threat to kill a teacher at the School, that Aaron circulated it among classmates for three weeks; that he had no reasonable expectation that it would not come to the attention of School officials; that when it did so it caused a substantial disturbance at the School; that it is reasonable that it should**

> **have done so; and that Aaron had reason to expect that it would do so.**

(Pet. Br. at 34A-35A) (emphasis added). The Court also dismissed Petitioners' claim against Superintendent Mabbett, finding that he was entitled to qualified immunity. (Pet. Br. at 36A).

The Second Circuit affirmed the judgment of the District Court. The Court declined to resolve the dispute as to whether the claims were barred by collateral estoppel arising from the determinations in the Superintendent's hearing. Nor did the Second Circuit address the parties' dispute as to whether transmission of Aaron's icon constituted a true threat within the meaning of this Court's decision in *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969). Instead, the Second Circuit held that

> school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Wisniewski, 494 F.3d at 38.

The Second Circuit considered this Court's recent discussion of *Tinker* in *Morse v. Frederick*, __ U.S. __, 127 S. Ct. 2618 (2007): "*Tinker* held that student expression may not be suppressed unless school officials

reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 2626. The Second Circuit specifically noted that its holding did not conflict with *Morse* since this Court "had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities" because it rejected the argument that the speech was not "at school." *Wisniewski*, 494 F.3d at 39 n.3, citing *Morse*, __ U.S. at __, 127 S. Ct. at 2624. Applying *Tinker*, the Second Circuit held that Aaron's "Kill Mr. VanderMolen" icon

> crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.' (internal citations and quotations omitted). For such conduct, *Tinker* affords no protection against school discipline.

Wisniewski, 494 F.3d at 38-39.

REASONS FOR DENYING THE PETITION

Petitioners assert that review by this Court is warranted to "resolve the growing conflict in the circuits, and to eliminate the ongoing uncertainty as to the First Amendment protection afforded to off-campus student speech." (Pet. Br. at 15). Specifically, Petitioners claim that the circuits "appear to be developing conflicting opinions" on 1) the parameters for a public school district punishing a student for off campus speech and 2) whether a school district's policy to "take all threats seriously" operates as an unlawful prior restraint on speech. (Pet. Br. at 14-15). However, Petitioners have failed to demonstrate that there is a "growing conflict" in the circuits on the application of *Tinker* to off campus speech or that the Second Circuit applied *Tinker* in a way that was contrary to Supreme Court precedent. Nor have Petitioners shown compelling reasons for this Court to exercise its discretion to review whether the District's policy to take threats seriously operated as a prior restraint on speech especially when that issue was not raised below. In any event, punishment of the student following the disruption engendered by his threat to a teacher was not unlawful simply because the District advised students that it would take all threats seriously.

I. The Second Circuit Properly Applied This Court's Decision in *Tinker v. Des Moines Independent School District* and Found That Petitioners' "Kill Mr. VanderMolen" Icon Was Not Protected Speech.

Petitioners claim that the Second Circuit erroneously applied *Tinker*, or effectively "overruled" it by applying it to out-of-school speech without finding a "sufficient" nexus between the speech and the District. (Pet. Br. at 22). Petitioners also contend that it was unfair for the Second Circuit to affirm the judgment below based on *Tinker*, when, they claim, the District Court did not analyze the "Kill Mr. VanderMolen" icon under *Tinker* and they did not argue it below. For the reasons set forth below, Petitioners' arguments lack merit and do not warrant review of the Second Circuit's decision.

A. The Second Circuit Properly Applied *Tinker* Based on Overwhelming Evidence in the Record of the Nexus Between the Speech and the School.

Petitioners go to great lengths to emphasize the obvious point that Aaron created the icon outside of school (Pet. Br. at 17), but they fail to demonstrate why the Second Circuit's application of *Tinker* to off campus speech that caused a substantial disruption at school requires review. Petitioners' claim that the Second Circuit failed to find a sufficient nexus between Aaron's speech and the District is baseless. Petitioners argue that in *Morse v. Frederick* this Court recited "a litany of contextual factors in determining that the speech was school-related" but because those same factors are not present in this case, then there was no nexus between

the icon and the District, other than its content. (Pet. Br. at 18). Whether the same "contextual factors" that were present in *Morse* are present here is not dispositive. Petitioners cite no authority for their assertions that the content of the speech cannot form the nexus to school, that districts can only punish student speech "aimed at the school" or speech that is "inherently unconstitutional (*e.g.*, a true treat or incitement)." (Pet. Br. at 20).[3]

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3. Petitioners cite several Pennsylvania district court decisions in which courts held that the school district could not punish a student for off campus speech. In each case, however, the District Court applied *Tinker*, but simply found insufficient evidence of nexus between the school district and the speech. *See e.g. Killion v. Franklin Reg'l Schl. Dist.*, 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) (applying *Tinker* to "Top Ten" list created off campus which was vulgar and insulting to school coach and noting that "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."); *Flaherty v. Keystone Oaks Schl. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003); *Latour v. Riverside Beaver Schl. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005). The fact that off campus speech in those cases could not lawfully be punished by the district under *Tinker*, because there was little or no relation to the school, is wholly irrelevant to this case. Here, the Second Circuit found a nexus between the speech and the school district, in that the icon was communicated from one student to another, it targeted a teacher and it caused substantial disruption in the school. Furthermore, Petitioners inexplicably cite those Pennsylvania district court cases from 2001, 2003 and 2005 as an indication that district courts "appear to be interpreting *Morse* to recognize that off campus speech, *not* related to any district function, is outside 'the far reaches of what the First Amendment permits.'" (Pet. Br. at 17-18) (emphasis in original). It is not clear how Petitioners can claim that those cases demonstrate an interpretation of *Morse* that is somehow at odds with *Wisniewski* (Pet. Br. at 17-18) when those cases *pre-dated Morse*, and both the Pennsylvania district court cases and *Wisniewski*, (unlike *Morse*), involve off campus speech.

Here, the Second Circuit clearly acknowledged that Aaron made and circulated the "Kill Mr. VanderMolen" icon out of school, but found overwhelming record evidence of a nexus to school which made the *Tinker* analysis appropriate. Contrary to Petitioners' argument, the Second Circuit *did* find a nexus to school, just not on the same facts that in *Morse v. Frederick* led this Court to *reject* Morse's claim that his was not a school speech case. *See Morse*, __ U.S. at __, 127 S. Ct. at 2624. There is no basis for Petitioners' claim that the Second Circuit had to find the same *Morse* "contextual factors" in this case in order to apply *Tinker*. Here, the Second Circuit specifically set forth undisputed facts that constituted the nexus between the speech and school.

> [O]n the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of Aaron's classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable.

Wisniewski, 494 F.3d at 39-40. Petitioners cite no authority for the proposition that the threatening nature of the icon and the target of the threat cannot form the nexus. In any event, there was ample evidence of nexus beyond the content.

As this Court explained in *Morse v. Frederick*, "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse v. Frederick*, __ U.S. at __, 127 S. Ct. at 2626 (quoting *Tinker*, 393 U.S. at 513, 89 S. Ct. at 740). Here, the Second Circuit simply applied that formulation of *Tinker* to hold that school discipline was proper where there could be "no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." *Wisniewski*, 494 F.3d at 40.

B. Petitioners Failed to Identify a Split in the Circuit Courts of Appeal on the Issue of Whether *Tinker* Applies to Off Campus Speech With a Nexus to School That Causes Substantial Disruption.

The Second Circuit's *Wisniewski* decision in no way "substantively overruled" *Tinker* by applying it to off campus speech, as Petitioners contend. There is nothing erroneous or even novel about the Second Circuit's application of *Tinker* to off campus speech in *Wisniewski*. Prior to *Morse*, in *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006), the Second Circuit summarized the framework for analyzing student speech as follows:

> We distill the following from *Tinker*, *Fraser* and [*Kuhlemeier*]: (1) schools have wide discretion to prohibit speech that is less than obscene – to wit, vulgar, lewd, indecent or

> plainly offensive speech; (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns"; and (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under [*Kuhlemeir*], the rule of *Tinker* applies. Schools may not regulate student speech unless it would materially and substantially disrupt classwork and discipline in the school.

(internal citations omitted). Well before that, the Second Circuit recognized in *Thomas v. Board of Education* that off campus conduct can create a foreseeable risk of disruption in school. 607 F.2d 1043, 1052 n.17 (2d Cir. 1979). Similarly, the Third Circuit in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001), found that "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under [*Kuhlmeier*], a school may regulate school-sponsored speech ... Speech falling outside these categories is subject to *Tinker*'s general rule ..." Likewise, the Ninth Circuit stated in *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992):

> We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude ... that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is

> governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*.

(internal citations omitted). The Second Circuit's application of *Tinker* in *Wisniewski* was in keeping with Supreme Court precedent and Petitioners failed to demonstrate that it conflicts with other Circuits' analysis of student speech cases.

Nor did *Morse* alter that framework; it simply permitted the school district to punish speech "reasonably viewed as promoting illegal drug use." *See Morse*, __ U.S. at __, 127 S. Ct. at 2625-28. Petitioners allude to "uncertainty" regarding the *Tinker* analysis and its application to off campus speech following *Morse*, but cite no cases demonstrating such uncertainty. At least one circuit has extended the rationale of *Morse* to find threats of mass violence in the school setting to be *per se* unprotected speech, but that only undermines Petitioners' argument. In *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007), the Court held that the threat of a mass school shooting was so devastating and particular to schools that it warranted a *Morse* analysis:

> [i]f school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," *Morse*, 127 S. Ct. at 2638, then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.

See Ponce, 508 F.3d at 771-72.

Finally, Petitioners argue that this is a case on the "outer boundary" where there is uncertainty as to when courts should apply the *Tinker* standard to off campus speech, citing *Morse*, 127 S. Ct. at 2624, and *Porter v. Ascension Parish Schl. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (Pet. Br. at 16-17). The uncertainty noted in *Porter* related to off campus speech brought on campus without the knowledge or permission of the speaker. 393 F.3d at 619. Even in *Porter*, a case Petitioners cite to bolster their claim of uncertainty, the Court acknowledged that:

> [m]any courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker. [citing *Boucher*, *Beussink* and *Killion*, among others]. Although reaching differing conclusions as to the legality of restrictions placed upon the speech in question, these cases consistently approach off-campus speech brought on-campus as subject to regulation under *Tinker's* 'material and substantial' disruption test.

Id. Likewise, in *Layschock v. Hermitage Sch. Dist.*, a district court case on which Petitioners implicitly rely (Pet. Br. at 18-20), the Court applied *Tinker* and analyzed the questions of nexus and substantial disruption in the context of off campus speech. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007) (applying *Tinker* to student's MySpace profile of principal for which he was suspended, but finding insufficient nexus). Here, Aaron's purposeful dissemination of an icon depicting the shooting of a teacher to fifteen classmates brought this case well within the reach of *Tinker*.

Having shown no conflict among the circuits, and no way in which the decision below decided the constitutionality of the speech in a way that conflicts with any relevant decisions of this Court, the petition should be denied.

C. The Second Circuit Was Not Required to Rule on the "True Threat" Issue In Order to Find a Nexus and Properly Apply *Tinker*.

The Second Circuit ruled that the *Watts* true threat analysis was too narrow a lens through which to view the District's punishment of the student:

> [W]e think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression, reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker* . . .

Wisniewski, 494 F.3d at 39. Petitioners blatantly mischaracterize that holding in an effort to bolster their "nexus" argument: Petitioners claim that "if there is no showing that Aaron's Buddy Icon was a true threat, as the Second Circuit held, the nexus to the District no longer exists." (Pet. Br. at 19). The decision that Aaron's "Kill Mr. VanderMolen" icon need not rise to the level of a "true threat" to be subject to discipline by the District is fully consistent with *Tinker*. The speech clearly had a "nexus" to the school: it was about a teacher, circulated

to students, and soon arrived at the school. When it arrived at school it created a disruption that would reasonably have been foreseen.

D. Petitioners Had an Adequate Opportunity to Argue Whether the School District Could Punish Aaron for Off Campus Speech and The Second Circuit Properly Affirmed Based on *Tinker*, Even Though That Was Not the Primary Rationale for the Judgment Below.

Petitioners claim that it was unfair for the Second Circuit to decide this case under *Tinker* because the briefing below and the District Court's opinion involved the true threat analysis, not *Tinker*. (*See* Pet. Br. at 14, selectively relying on only the portion of the rule in *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719 [1941] which states that appellate courts generally do not consider issues that were not raised below).[4] Petitioners' argument distorts the District Court's opinion.

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4. Petitioners ignore that *Hormel* went on to explain that rule was not absolute and actually considered the issue not raised below. Petitioners also ignore the well-established rule that "an appellate court may affirm the judgment of the district court on any ground appearing in the record . . . [and] may affirm the grant of summary judgment on grounds different from those relied on by the court below." *Shumway v. UPS, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). The Second Circuit has "repeatedly recognized that the rule is not an absolute bar 'where the issue is purely legal and there is no need for additional fact-finding' or 'where consideration of the issue is necessary to avoid manifest injustice.'" *Krumme v. Westpoint Stevens, Inc.*, 238 F.3d 133, 142, citing *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996); *see also Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994).

Regardless of whether the District Court cited *Tinker*, it explicitly rejected Petitioners' argument that Aaron's "Kill Mr. VanderMolen" icon was out of school speech for which the District could not constitutionally punish the student. The District Court held:

> Further, to the extent that plaintiffs attempt to argue that Aaron's conduct was purely out-of-school conduct, the undisputed evidence establishes that the icon was a threat to kill a teacher at the School, that Aaron circulated it among classmates for three weeks; that he had no reasonable expectation that it would not come to the attention of School officials; that when it did so it caused a substantial disturbance at the School; that it is reasonable that it should have done so; and that Aaron had reason to expect that it would do so.

(Pet. Br. at 35A). Petitioners cannot complain that they did not have an opportunity to refute the application of *Tinker* to Aaron's speech when the District Court specifically recited the undisputed "contextual factors" linking the icon to the school, found that it was reasonably foreseeable that the icon would come to the attention of school officials, and that it was reasonably foreseeable that it would cause a substantial disruption at the school. *Id.* Finally, whether a sufficient nexus exists based on those undisputed facts is a question of law, which was properly resolved by the Second Circuit, regardless of whether Petitioners' appeal centered on *Tinker*. *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002). Even if *Tinker* issues had not been addressed below, the Second Circuit properly exercised its discretion to affirm on the basis of *Tinker*.

II. The District's Threat Policy Was Not a *De Facto* Prior Restraint On Constitutionally Protected Student Speech and Does Not Warrant Review by this Court.

Petitioners assert without substantiation that the circuits are "developing conflicting opinions" and that there is uncertainty on the question of whether a school district may use an internal policy to take threats seriously to manufacture a "subjective 'substantial disruption.'" (Pet. Br. at 14-15). Petitioners argue that the Second Circuit's finding of a substantial disruption caused by the "Kill Mr. VanderMolen" icon was flawed because it was based on an impermissibly broad policy to "take all threats seriously."[5] (Pet. Br. at 23). Even if Petitioners' challenge were not moot because Aaron is no longer a student in the District, Petitioners fail to demonstrate any conflict in the opinions of the circuit courts of appeal or advance any other arguments that would support review of the District's threat policy by this Court.

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5. Petitioners raise for the first time in this Court that the District's policy on threats was an unlawful prior restraint. The Second Circuit did not address this question. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976). Although the bar against raising new issues may be overcome to avoid manifest injustice, no such interest would be served by considering the prior restraint issue here, where Aaron is no longer a student in the District and Petitioners' challenge is therefore moot. Petitioners cite *Jacobs v. Board of School Com'rs*, 490 F.2d 601, 604-05 (7th Cir. 1973) (Pet. Br. at 24), but acknowledge that the overbreadth and vagueness challenges to the policy at issue were vacated as moot by this Court because the student graduated. *Jacobs*, 420 U.S. 128 (1975). Petitioners' reliance on *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), is also to no avail because the parties in that case, unlike here, stipulated that the student was still in school.

Petitioners cannot repackage their appeal of the substantial disruption finding under the guise of a prior restraint challenge. Aaron was punished for threatening a teacher in violation of certain provisions of the student handbook. He was punished after the disruption occurred. The District did not "manufacture" the disruption through an impermissibly broad "no threats" policy, as Petitioners claim. The District's "no threat" policy did not restrain otherwise protected speech. The District's threat policy, far from being overly broad or vague, reinforced that it was reasonably foreseeable that the icon Aaron purposely constructed and circulated to the very same students who heard the warnings about threats, would come to the attention of the school administrators and the target of the threat. The District did not "manufacture" the disruption through an impermissibly broad "no threats" policy, as Petitioners claim.

Petitioners' reliance on *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191 (2003) is misplaced, since it involved an overbreadth challenge to a trespass ordinance that involved potential criminal penalties. The concerns raised in *Hicks* that an overly broad law would "chill" protected speech are not present here, where the speech involves threats. Petitioners' reliance on *Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. Aug. 24, 2005), likewise is not helpful. In *Latour*, the court found no substantial disruption under *Tinker* because the disruption at issue was actually caused by the student body's reaction to the actions the school administrators took with respect to the speech at issue. *Latour* did not involve a specific threat to a school teacher. Here, unlike *Latour*, Aaron's

"Kill Mr. VanderMolen" icon itself caused the substantial disruption at school and the disruption was not created by the policy to take all threats seriously. In this case, the Second Circuit held that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." *Wisniewski*, 494 F.3d at 40. Accordingly, there was no prior restraint of protected speech. Regardless of whether the risk of substantial disruption was based on Mr. VanderMolen's reaction to the icon or the District's investigation of it, Petitioners have advanced no basis for granting review of that aspect of the Second Circuit's decision.

In any event, even if they had not already announced their policy to take all threats seriously, District administrators would have been obligated to investigate Aaron's threats of violence and were not required to wait until a "substantial disruption" had already occurred. School officials may take action if they have a "specific and significant fear of disruption." *Saxe v. State College Area Sch. Dist.*, 240 F.3d at 214; *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998) (school need not demonstrate actual harm to take disciplinary actions). To the extent that the investigation itself would cause the disruption, that, too, was a reasonably foreseeable consequence of circulating an icon that threatened a teacher, whether or not the District had an announced policy to take all threats seriously, and did not violate the First Amendment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition in its entirety.

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Respectfully submitted,

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